80450-8

ORIGINAL

No. 80459-1

SUPREME COURT OF THE STATE OF WASHINGTON

EMILY LANE HOMEOWNERS ASSOCIATION,
a Washington nonprofit corporation,

Respondent,

v.

COLONIAL DEVELOPMENT, LLC,
a Washington limited liability company,

Petitioner,

THE ALMARK CORPORATION, a Washington corporation; CRITCHLOW HOMES, INC., a Washington corporation; MARK B. SCHMITZ, an individual; RICHARD E. WAGNER and ESTHER WAGNER, d/b/a WOODHAVEN HOMES, individuals; ALFRED J. MUS, an individual; and JEFFREY CRITCHLOW, an individual,

Petitioners.

PETITIONERS' REPLY TO RESPONDENT'S ANSWER TO PETITION FOR REVIEW

Eileen I. McKillop, WSBA 21602
Attorneys for Petitioners

OLES MORRISON RINKER & BAKER LLP
701 PIKE STREET, SUITE 1700
SEATTLE, WA 98101-3930
PHONE: (206) 623-3427
FAX: (206) 682-6234

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I. INTRODUCTION

Respondent Emily Lane Homeowners Association ("Association") falsely states that the issue of whether RCW 25.15.303 only allows claims *against* an dissolved or cancelled LLC, but does not allow an LLC to *prosecute* any claims, was not presented or considered by the Court of Appeals in this case. In fact, the Court of Appeals requested amicus curiae briefs in this case on this exact issue.[1] The Washington State Trial Lawyers Association Foundation and the Washington State Bar Association filed an amicus curiae brief on this issue, as well as the issue of whether RCW 25.15.303 applies to claims against a cancelled LLC.[2] Petitioners filed an answer to the amicus curiae briefs addressing this issue.[3] Thus, the issue of whether RCW 25.15.303 only allows claims against an LLC, but does not allow an LLC to prosecute any claims, was argued to the appellate court and should be considered on appeal.

Additionally, the Association contends that the Court of Appeals ruled that its claims against the LLC's five members, and the two nonmembers, have factual merit and that the dismissal of these claims

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[1] See Appendix A.
[2] See Appendix B.
[3] See Appendix C.

was in error. This is a misstatement of the record. The Court of Appeals did not consider the merits of the eighteen causes of action asserted by the Association against the LLC, its five members, and two nonmembers. The Court of Appeals' review was limited solely to the legal issue of whether the "members" were immune from liability under Washington's Limited Liability Company Act. Without considering the merits of any of the claims, the Court of Appeals ruled that "to the extent the trial court's summary judgment dismissed the claims against individual members of Colonial on the basis that the LLC structure provided immunity from liability, it was error." Unlike the Court of Appeals, the trial court considered the merits of the Association's claims, and found no basis in fact or law to support any of the eighteen causes of action against the five members and the two nonmembers. The trial court's decision was not based on whether the members were immune under the Limited Liability Company Act. The Court of Appeals' mere conclusion that the five members "may be" liable for failing to properly wind up the company is not supported by the evidence or RCW 25.15.295 or RCW 25.15.300.

Lastly, Colonial and its five members' mere defense of the Association's eighteen causes of action following the assertion of an

affirmative defense does not result in a waiver of the affirmative defense. This same argument was flatly rejected by this court in *Ballard Square*.

II. COUNTER-STATEMENT OF THE CASE

Throughout this litigation, counsel for Respondent has misrepresented the record. The first of such misrepresentations that is set forth in Respondents' Answer to Petition for Review is in the first paragraph of its "Factual Background," page 3. Here, Respondent claims, falsely, that trial court ruled that "the so-called 'limited warranty' waiver was illegal and void" and in footnote 1, that "the trial court rejected the LLC's attempt to enforce it at summary judgment." The Association cites to the trial court's order dismissing its claims on summary judgment against the five members and two nonmembers to support this assertion. However, the trial court's order did not include any ruling that it had rejected the limited warranty as illegal or void, and there is no evidence in the record to support such a claim.

The second of such misrepresentations is set forth in the second paragraph of its "Factual Background,"page 3. The Association claims again, falsely, that "the members appointed their employees to serve as the Board of Directors for the Association while the Declarant LLC controlled the Association" and that "these declarant-appointed members

owed the Association a fiduciary duty of care." None of the members of Colonial Development, LLC served as a board member for the Association during the approximately one year period from July 2001 until the transition date of June 27, 2002. (CP 155, CP 307-308). The initial board members were employees of Prudential MacPhersons. (CP 155, CP 461, CP 2131-2132, CP 717, CP 918, CP 2142-2145). None of the initial board members were employed by the LLC, or any member of the LLC.

The third of such misrepresentations is set forth in its "Factual Background," at pages 3 through 5, wherein the Association claims that the owners complained repeatedly to the LLC about "construction quality and water intrusion" and "many of the unresolved warranty complaints were generally the same type as the defects now at issue in this litigation" and "unresolved window leaks, deck soffit deterioration caused by water intrusion, inadequate repairs following leaks, lack of response to window leaks, recurring window leaks, and failure to follow up on window leaks and water damage." The so-called window leaks actually involved only two windows, which were in Units A201 and A102. (CP 721-729; CP 730-735; CP 736-737; and CP 746-750; CP 768-770). The problem with the window in Unit A201 was repaired in

2003 by the siding subcontractor. (CP 721-729; CP 730-735; CP 736-737; and CP 746-750; CP 768-770). After the repairs, a water test was done on the window and there were no further complaints of any leakage relating to this window. (CP 768-770; CP 721-729; CP 720-735; CP 736-737; CP 746-750).

The second window was in A102 and was caused by a broken seal in the window itself. (CP 721-729; CP 720-735; CP 736-737; CP 746-750). The window was replaced by the manufacturer, Milgard Windows, in 2002. (CP 2154). After the window was replaced, there were no further problems reported with this window or any other windows. (CP 721-729; CP 720-735; CP 736-737; CP 746-750). The Association's claims of unresolved window leaks is unsubstantiated by the record.

More importantly, *none* of the previous warranty claims involve *any* of the Association's alleged defects in this action. There are no allegations of any leaks in any windows or doors in this complex. The only allegation the Association has made with respect to the windows and doors is that a couple windows have broken nail flanges, which most likely occurred after original construction, and that a couple windows have nails that were not in the pre-punched nail holes. (CP 1238).

The Homeowners' prior warranty requests involved only minor defects in the interiors of the units, such as caulking, grout issues, minor cracks in tubs, torn vinyl flooring and loose carpet. The only warranty request received by the LLC in 2004 was from Unit C102 for some paint bubbling up on a toilet seat and some drywall repairs. (CP 457-458). Even though the one year warranty on Unit C102 had expired on October 9, 2002, the LLC still made the repairs. (CP 752-753). The few warranty requests relating to the common elements, involved only blistering paint on the underside of a deck which was repaired by merely scraping and repainting. (CP 2049-2050). This condition was not related to any water intrusion, and was repaired by the LLC without any further complaints. The Association's repeated accusations concerning "leaking windows" and "deck soffits falling apart from water intrusion" are blatant misrepresentations of the evidence.

The only observed evidence of any water intrusion in this entire condominium complex is at the outer face of the walkways where the stair stringers and guardrail posts were attached, and at the base of the post where the materials were below grade and concrete had been poured above the materials. (CP 932-937). This problem was contributed to by the Association's own landscaping activities. However, even then, the

structural posts were pressure treated materials, which is permitted in Section 2306 of the UBC. (CP 932-937).

The experts agree that penetration flashings have been properly installed around all window jambs, sills, and heads of the windows. (CP 932-937). Additionally, the weather resistive barrier has been properly lapped at all of the windows, doors and vents, and no water intrusion or damage was found at any window. (CP 932-937). Even the bellybands have been flashed correctly and the weather resistive barrier correctly installed behind the bellyband and lapped over the bellyband flashing. (CP 932-937).

The Association was not even aware of any of the alleged defects asserted in this action until May 2005, when its experts performed an intrusive investigation. (CP 157 and CP 589). There is no dispute that the Association did not give the LLC or its members any notice of the claims asserted in this action until June 2005, after its certificate of formation was cancelled. (CP 1344-1355 and CP 583). In an attempt to prove "actual knowledge" of the alleged defects to support its claims for breach of fiduciary duty, breach of the purchase and sale agreements, negligent misrepresentation, fraudulent concealment, and failure to comply with RCW 25.15.300 in winding up the LLC, the Association

argued that the LLC and its members "should have known" of the alleged defects by virtue of being involved in the original construction of the project, and by the past unrelated warranty claims. The trial court rejected the Association's argument that by virtue of their involvement in the construction and the prior unrelated warranty requests, the LLC and its members were put on inquiry notice and "should have known" of the alleged defects.

III. ARGUMENT

A. THE ISSUE OF WHETHER RCW 25.15.303 ONLY ALLOWS CLAIMS AGAINST A DISSOLVED OR CANCELLED LLC, BUT NOT BY AN LLC WAS PRESENTED TO THE APPELLATE COURT.

The Association claims that the LLC never raised the issue of whether RCW 25.15.303 only allows claims against a dissolved or cancelled LLC but does not allow an LLC to prosecute any claims to the appellate court. The Court of Appeals requested amicus curiae briefs in this case on this exact issue. There is no dispute that the Washington State Trial Lawyers Association Foundation and the Washington State Bar Association filed an amicus curiae brief on this issue, as well as the issue of whether RCW 25.15.303 applies to claims against a cancelled LLC. Although Emily Lane did not file an answer to the amicus briefs, Petitioners did file an answer to the amicus curiae briefs addressing this

issue. Thus, the issue of whether RCW 25.15.303 only allows claims against an LLC, but does not allow an LLC to prosecute any claims, was argued to the appellate court and should be considered on appeal.

The Association contends that the Court of Appeals' interpretation of the statute to only allow claims "against" a dissolved or cancelled LLC, is "imaginary anyway" because the LLC's members are now "trustees" of the LLC's assets, including its claims against the subcontractors and insurers. The Association is incorrect. The members have no right to assert any claims on behalf of the LLC. RCW 25.15.295 provides that after the filing of a certificate of cancellation, the members *may not* prosecute and defend suits, or settle and close the LLC's business, or dispose of and convey the LLC's property, discharge or make reasonable provisions for the LLC's liabilities, or distribute to the members any remaining assets of the LLC. Thus, the LLC members have absolutely no right to "act in their own names" to prosecute the LLC's claims against its subcontractors and insurance carrier.

B. THE COURT OF APPEALS ERRONEOUSLY CONCLUDED THAT THE MEMBERS "MAY BE" PERSONALLY LIABLE TO THE ASSOCIATION FOR FAILURE TO PROPERLY WIND UP THE LLC AND UNDER A THEORY OF PIERCING THE CORPORATE VEIL.

The Association claims that the issue of whether the five members are personally liable under the Limited Liability Company Act for failure to properly wind up the company "would be better addressed after trial." The Petitioners strongly disagree. Without even considering the merits of the Association's claims against the Petitioners, the Court of Appeals erroneously concludes that the members "may be" personally liable for failure to properly wind up the company.

As the Court of Appeals noted in *Chadwick*[4], a person winding up a limited liability company's affairs is not personally liable to claimants if they make reasonable provisions to pay all claims and obligations ***known*** to the limited liability company upon dissolution.[5] RCW 25.15.300 sets forth how the assets should be distributed:

> (1) Upon the winding up of a limited liability company, the assets shall be distributed as follows:
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> (a) To creditors, including members and managers who are creditors, to the extent otherwise permitted by law, in satisfaction of liabilities of the limited liability company

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[4] *Chadwick Farms Owners Ass'n v. FHC, LLC*, 160 P.3d 1061 (2007).
[5] RCW 25.15.300(2).

(whether by payment or the making of reasonable provision for payment thereof) other than liabilities for which reasonable provision for payment has been made and liabilities for distributions to members under RCW 25.15.215 or 25.15.230;

(b) Unless otherwise provided in a limited liability company agreement, to members and former members in satisfaction of liabilities for distributions under RCW 25.15.215 or 25.15.230; and

(c) Unless otherwise provided in a limited liability company agreement, to members first for the return of their contributions and second respecting their limited liability company interests, in the proportions in which the members share in distributions.

(2) A limited liability company which has dissolved shall pay or make reasonable provision to pay all claims and obligations, including all contingent, conditional, or unmatured claims and obligations, ***known to the limited liability company*** and all claims and obligations which are known to the limited liability company but for which the identity of the claimant is unknown. If there are sufficient assets, such claims and obligations shall be paid in full and any such provision for payment made shall be made in full. If there are insufficient assets, such claims and obligations shall be paid or provided for according to their priority and, among claims and obligations of equal priority, ratably to the extent of assets available therefor. Unless otherwise provided in a limited liability company agreement, any remaining assets shall be distributed as provided in this chapter. Any person winding up a limited liability company's affairs who has complied with this section is not personally liable to the claimants of the dissolved limited liability company by reason of such

person's actions in winding up the limited liability company.[6]

To prove personal liability of the members under RCW 25.15.300(2), the Association must show that the members had actual knowledge of its claim upon dissolution and during the winding up of the LLC. By its plain wording, RCW 25.15.300(2) does not include unknown and unasserted claims. Otherwise, that would mean that any former person or entity would be a creditor if the statutory phrase "*contingent, conditional or unmatured claims and obligations, **known to the limited liability company***" really means "*contingent, conditional, or unmatured claims and obligations, **unknown** to the limited liability company.*" There is nothing in RCW 25.15.300 to support the proposition that a member of a dissolved LLC must create a trust fund for "potential" unknown claimants.

Here, there is no evidence that any of the members had knowledge of the Association's claims upon dissolution and during the winding up of the LLC. In fact, the Association did not even have knowledge of its claim until May 2005, several months after the LLC had completed its winding up and its certificate of formation was cancelled. The Association's contention that "unresolved warranty

[6] RCW 25.15.300 (emphasis added).

claims" create an "inference" that the LLC's decision to dissolve was an improper winding up under RCW 25.15.300 is without merit. As previously discussed, there were no "unresolved warranty claims" and, more importantly, none of the Association's claims asserted in this action involve any previous warranty claims. Moreover, the Association's contention that the LLC is potentially liable under RCW 25.15.300 because it "should have known" of the alleged defects by virtue of having supervised the construction is insufficient to impose personal liability under RCW 25.15.300. Actual knowledge of the Association's claim can not be implied simply because the LLC was the builder. The Association failed to present any evidence that the LLC or its members had actual knowledge of its claims in this action during its winding up of the LLC to establish personal liability under RCW 25.15.300. The Court of Appeals clearly erred in concluding that the members may be personally liable for improperly winding up the LLC.

Furthermore, under RCW 25.15.125(1), members of an LLC are not personally liable for the debts, obligations, and liabilities of an LLC, whether arising in tort or contract. A member of a LLC is only

personally liable for his or her own torts.[7] The Association did not present any evidence that its claims involve individual torts by any of the members.

Perhaps more troubling, though, is the Court of Appeals' complete disregard of our case law that requires a showing of actual fraud or abuse to pierce the corporate veil.[8] Piercing the corporate veil requires an "overt intention to disregard the corporate entity by using it for an improper purpose."[9] Piercing the corporate veil is an equitable remedy imposed to rectify an abuse of the corporate privilege.[10] To pierce the corporate veil, two separate, essential factors must be established. First, the corporate form must be intentionally used to violate or evade a duty.[11] Second, the fact finder must establish that disregarding the corporate veil is necessary and required to prevent an unjustified loss to the injured party.[12]

The Association claims that the "failure of the members' agents serving on the Board to take action in response to quality issues", the

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[7] RCW 25.15.125(2).

[8] *Truckweld v. Olson*, 26 Wn. App. 638, 644-45, 618 P.2d 1017 (1980); *Rogerson Hiller Corp. v. Port Angeles*, 96 Wn. App. 918, 924, 982 P.2d 131 (1994).

[9] *Culinary Workers Trust v. Gateway Café, Inc.*, 91 Wn.2d 353, 366, 588 P.2d 1334 (1979).

[10] *Truckweld Equip. Co. v. Olson*, 26 Wn.App. 638, 643, 618 P.2d 1017 (1980).

[11] *Meisel v. M & M Modern Hydraulic Press Co.*, 97 Wn.2d 403, 410, 645 P.2d 689 (1982).

[12] *Id.*

LLC's decision to dissolve, and the LLC's defense of this case, shows deceptive conduct which could justify piercing the corporate veil. The Court of Appeals blindly accepted the Association's arguments without any analysis of the essential factors necessary to pierce the corporate veil. None of the evidence establishes fraud or abuse of the corporate form to justify piercing the corporate veil and holding these members personally liable for the LLC's acts. First, none of the members were ever appointed to the Association's Board, and there is no evidence that any of the members were aware of any defects in the condominiums during the one-year period of declarant control. Second, there were no unresolved warranty claims at the time the LLC dissolved, and, more importantly, none of the Association's alleged defects in this action involve any issues raised in a prior warranty claim. Lastly, it is difficult to understand how the LLC's and its member's mere defense of the numerous claims asserted against them constitutes fraud or abuse of the corporate form. The Court of Appeals clearly erred in concluding that the evidence may establish corporate disregard, fraud or abuse by any of its members. The Association's claims against the five members (and the two nonmembers) should be dismissed.

C. THE LLC AND THE MEMBERS HAVE NOT WAIVED THEIR DEFENSE BY DEFENDING THIS LAWSUIT.

The Association argues that the LLC and its members have waived any defense under the Limited Liability Company Act because they are defending this lawsuit. This same argument was flatly rejected by the Supreme Court in *Ballard Square*. In *Ballard Square*, Justice J.M. Johnson stated:

> The Association argues that Dynasty is still winding up because it is defending this lawsuit. However, it is illogical to conclude that a corporation that has otherwise liquidated its assets and ceased to exist is in the process of winding up merely because it must defend itself. To allow this result would mean that a corporation would be winding up forever at the will of plaintiffs' lawsuits.[13]

The Association cites no case law supporting its assertion that a limited liability company somehow resurrects its existence by merely defending a post-cancellation claim. The Association's argument undermines the entire statutory scheme regarding the rights of a limited liability to sue or be sued after the filing of a certificate of cancellation. By the Association's reasoning, a limited liability company that has filed a certificate of cancellation may be sued at any time following its cancellation, and the very act of defending against a post-dissolution or

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[13] *Ballard Square Condominium Owners Ass'n v. Dynasty Const. Co.*, 146 P.3d 914, 926, n.1 (2006).

post-cancellation claim resurrects the existence of the limited liability company. As a practical matter, an LLC would exist forever so long as Plaintiffs wanted to sue.

Here, the LLC and its members filed answers to the Association's complaints asserting an affirmative defense that Colonial Development, LLC's certificate of formation was cancelled. Contrary to the Association's contentions, the Petitioners have conducted very little discovery in this case. The Petitioners served the Association with only one set of interrogatories. The only deposition taken by any of the Petitioners is the deposition of the Association's President. The Petitioners served 30(b)(6) subpoena duces tecum to the Association's experts, Morrison Hershfield and MDE Associates, to obtain their records. No depositions were taken of these experts or any other expert in this case. An investigation of the alleged defects was conducted on behalf of all of the Petitioners, but only after the Association had agreed to dismiss its claims against all the members and the two individually named defendants. The Association subsequently refused to abide by its promise.

This case is in contrast to the facts in *Lybbert*[14] and *King*[15]. In *Lybbert*, the plaintiffs sued Grant County but mistakenly did not effect proper service. The county appeared, indicating in its notice of appearance that it was not "waiving objections to improper service or jurisdiction." The county then proceeded as though preparing for litigation on the merits, and made no inquiry in its discovery effort regarding the sufficiency of process. Plaintiffs served interrogatories on the county asking whether it would be relying on the affirmative defense of insufficient service of process. Several months later, without having answered the interrogatory, the county filed an answer and asserted the affirmative defense of insufficient service of process for the first time. If the county had timely responded to the interrogatory, plaintiffs could have cured the defective service. Rather, the county waited for the limitation period to expire before filing its answer and asserting the defense. The court held that the county waived its defense by acting in an inconsistent and dilatory manner.[16]

In *King v. Snohomish County,* Snohomish County raised a claim filing defense in its answer. The court held that the county was thus not

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[14] *Lybbert v. Grant County*, 141 Wn.2d 29, 40, 1 P.3d 1124 (2000).
[15] *King v. Snohomish County*, 146 Wn.2d 420, 424, 47 P.3d 563 (2002).
[16] *Lybbert*, 141 Wn.2d at 45, 1 P.3d 1124.

dilatory in asserting the defense. However, the county's assertion of the defense was inconsistent with its behavior for the four years prior to trial. The county failed to clarify the defense in its response to an interrogatory seeking clarification, on the ground that the interrogatory was vague. It argued a summary judgment motion without mentioning the defense, and did not raise the defense again until three days before trial. The court noted that all parties to the case had engaged in costly and lengthy discovery and litigation and that the defense could have been disposed of early in the litigation prior to these expenditures and at a time when the defect could have been remedied.[17]

In this case, the LLC, and its members put the Association on notice of the defense in their original answers, in their opposition to the Association's motion to amend, in their interrogatory answers, and the Association knew that the Petitioners were asserting the defense. There are simply no grounds to support a waiver in this case.

IV. CONCLUSION

The Court of Appeals improperly applied RCW 25.15.303 retroactively as a curative and remedial statute, despite the fact that it creates a new substantive right against a cancelled LLC. Moreover, the

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[17] *King*, 146 Wn.2d 420, 426, 47 P.3d 563.

plain language of the amendment only applies to dissolved LLC's and not to cancelled LLC's, who have no ability to reinstate. The Court of Appeals erroneously interpreted RCW 25.15.303 to only allow claims against a dissolved LLC but not by a dissolved LLC. Lastly, the Court of Appeals' mere conclusion that the members may be liable for improperly winding up the LLC under RCW 25.15.300(2) because the LLC "should have known" of the Association's unasserted claim is contrary to the plain language of the statute. The Association failed to prove its claims against the members and the nonmembers, and there is no evidence of fraud or abuse to support a piercing of the corporate veil. This court should grant the Petition for Review and resolve these important issues which impact every single limited liability company formed in Washington.

DATED this 30 day of August, 2007.

OLES MORRISON RINKER & BAKER LLP

By _____
Eileen I. McKillop, WSBA 21602
Attorneys for Petitioners

APPENDIX

A. Court of Appeals' Letter to All Counsel and Amicus dated November 22, 2006.

B. Brief of Amicus Curiae Washington State Bar Association.

C. Answer of Appellant/Cross-Respondent Colonial Development, LLC to WSBA's and WSTLA's Foundations Amicus Curiae Brief.

APPENDIX A

WILLIAM H. ELLIS, Court Commissioner
Division One
One Union Square
600 University Street
Seattle, Washington 98101

The Court of Appeals
of the
State of Washington

464-7649
AREA CODE 206

November 22, 2006

Washington State Trial
Lawyers Assoc.
1809 7th Avenue, Ste 1500
Seattle, WA 98101-1328

Washington State Bar Assoc.
Amicus Brief Committee
2101 Fourth Avenue, 4th Floor
Seattle, WA 98121

John Phillip Evans
Mary H. Spillane
Margaret A. Sundberg
Williams Kastner & Gibbs PLLC
601 Union Street, Ste 4100
Two Union Square Bldg.
Seattle, WA 98101-2380

Richard Scott Fallon
Attorney at Law
1111 Third Avenue, Ste 2400
Seattle, WA 98101-3238

Martin T. Crowder
Michaelanne Ehrenberg
Karr Tuttle Campbell
1201 Third Avenue, Ste 2900
Seattle, WA 98101-3028

Robert Kendall Goff
Daniel J. De Walt LLP
Goff & DeWalt
3226 Rosedale Street, Ste 100
Gig Harbor, WA 98335-1806

Eileen I. McKillop
Oles Morrison Rinker & Baker LLP
701 Pike Street, Ste 1700
Seattle, WA 98101-3930

Building Industry Assoc. of
Washington
P.O. Box 1909
111 West 21st Avenue
Olympia, WA 98507

Washington Defense Trial Lawyers
Two Union Square
601 Union Street, Ste 4100
Seattle, WA 98101

John Patrick Hayes
Viivi Vanderslice
Forsberg & Umlauf
900 4th Avenue, Ste 1700
Seattle, WA 98164-1050

James Benjamin Meade, II
Forsberg & Umlauf
950 Pacific Avenue, Ste 400
Tacoma, WA 98402-4441

Jonathan Dirk Holt
Anthony Robert Scisciani, III
Scheer & Zehnder LLP
701 Pike Street, Ste 2200
Seattle, WA 98101-2358

William Scott Clement
John E. Drotz
Clement & Drotz
2801 Alaskan Way, Ste 300
Pier 70
Seattle, WA 98121-1128

Mark Edward Mills
Susan Kate Fuller
Law Offices of William D. Garcia
1601 Fifth Avenue, Ste 1210
Seattle, WA 98101-3602

Mark Gregory Honeywell
David B. Jensen
Michelle Menely
Gordon Thomas Honeywell
600 University Street, Ste 2100
One Union Square Bldg.
Seattle, WA 98101-4161

Leonard D. Flanagan
Justin D. Sudweeks
Levin & Stein
201 Queen Anne Avenue North
Ste 400
Seattle, WA 98109-4824

RE: No. 56879-5-I, Grateful Siding, Inc. v. Roosevelt, LLC & Steinvall, Inc.
No. 58825-7-I, Colonial Dev. LLC v. Emily Lane Homeowners
No. 58796-0-I, Chadwick Farms v. F.H.C.

Dear Counsel:

The Court has before it three cases dealing with Limited Liability Companies and their capacity to sue or be sued under chapter 25.15 RCW. The cases are Grateful Siding v. Roosevelt, LLC, number 56879-5 (consolidated with number 56970-8); Chadwick Farms v. F.H.C., number 58796-0; and Colonial Devl. LLC v. Emily Lane, number 58825-7.

Pursuant to RAP 10.6(c), the Court requests amicus curiae briefs addressing the following issues:

1. The applicability, if any, of Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co., 2006 Wash. LEXIS 875 (Number 76938-9, filed November 9, 2006) to limited liability companies;
2. What remedies are available after dissolution under RCW 25.15.303 and whether the section applies only to actions against a limited liability company, rather than actions by a limited liability company;
3. Whether a certificate of cancellation means something more than a dissolution, and, in particular, the effect of the following language in RCW 25.15.295(2):
   > Upon dissolution of a limited liability company and until the filing of a certificate of cancellation as provided in RCW 25.15.080, the persons winding up the limited liability company's affairs may, in the name of, and for and on behalf of, the limited liability company, prosecute and defend suits, whether civil, criminal, or administrative, gradually settle and close the limited liability company's business, dispose of and convey the limited liability company's property, discharge or make reasonable provision for the limited liability company's liabilities, and distribute to the members any remaining assets of the limited liability company. (Emphasis added).
4. What is the retroactive effect, if any, of the 2006 amendments to RCW 25.15.303, and what the amendments mean in the context of a certificate of cancellation;

5. Whether the common law has any application to limited liability companies, and, if so, how the common law applies.

The Court invites amicus curiae briefs from the following organizations:

1. Washington State Bar Association Corporate/Business Law Sections;
2. Building Industry Association of Washington;
3. Washington State Trial Lawyers' Association; and
4. Washington Defense Trial Lawyers

Any amicus curiae briefs should be filed no later than December 22, 2006 and served on the counsel of record for each of the parties in the three cases listed above. Any response should be filed and served no later than January 22, 2007. The amicus curiae briefs and the responses should not exceed 25 pages in length.

Chadwick Farms v. F.H.C., number 58796-0; and Colonial Devl. LLC v. Emily Lane, number 58825-7, which are presently set for consideration on January 23, 2007, shall be re-scheduled for argument on February 13, 2007, at 1:30 p.m. The present briefing schedule for Colonial Devl. LLC v. Emily Lane, number 58825-7, shall remain in place.

Sincerely,

William H. Ellis
Court Commissioner

APPENDIX B

No. 56879-5-I (56970-8-I), 58825-7-I, 58796-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

ROOSEVELT, LLC., and STEINVALL CONSTRUCTION, INC.,
Third-Party Plaintiff and Third-Party Defendant/Appellants,

v.

GRATEFUL SIDING, INC., et al.,
Third-Party Defendant/Respondents.

COLONIAL DEVELOPMENT LLC,
Defendant/Appellant,

v.

EMILY LANE TOWNHOMES CONDOMINIUM OWNERS' ASS'N,
Plaintiff/Respondent/Cross-Appellant.

CHADWICK FARMS HOMEOWNERS ASS'N,
Plaintiff/Appellant,

v.

F.H.C., LLC,
Defendant/Third-Party Plaintiff/Respondent/Cross-Appellant,

v.

AMERICA 1st ROOFING & BUILDERS, INC., et al.
Third-Party Defendants/Cross-Respondents.

BRIEF OF *AMICUS CURIAE* WASHINGTON STATE BAR ASSOCIATION

Paul H. Beattie
WSBA No. 30277
Darby & Darby, P.C.
1191 Second Avenue, 20th Floor
Seattle, WA 98101-3404

Ellen Conedera Dial
WSBA No. 9522
Washington State Bar Association
1325 Fourth Avenue, Suite 600
Seattle, WA 98101-2539

Attorneys for *Amicus Curiae* WSBA

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I. INTRODUCTION

This Court has solicited *amicus curiae* briefs on several issues concerning the proper interpretation of certain provisions of the Washington Limited Liability Company Act ("the Act"), specifically RCW 25.15.295(2) and RCW 25.15.303. Paraphrased slightly, those questions, along with the Washington State Bar Association's (WSBA's) brief responses, are as follows:

1. **In the context of RCW 25.15.295(2), is there a difference between "dissolution" and "cancellation?"**

WSBA Response: Yes. When a Washington Limited Liability Company ("LLC") "suffers" dissolution, it enters a "winding up" period. During this time, it can still "prosecute and defend" lawsuits. Once the LLC's certificate of formation is "canceled," however, the LLC ceases to exist as a legal person; it can no longer sue or be sued. Under the Act, there is therefore a significant difference between "dissolution" and "cancellation."

2. **What remedies are available after dissolution under RCW 25.15.303?**

WSBA Response: By its terms, RCW 25.15.303 applies only to actions *against* an LLC; it has no effect on actions *by* an LLC. RCW 25.15.303 allows an LLC to be sued on claims accruing either before or after

the LLC's dissolution, so long as that suit is brought within three years of the effective date of that *dissolution.*

RCW 25.15.303 does not explicitly address whether an LLC can be sued after the LLC's certificate of formation is canceled. Neither does it purport to change RCW 25.15.295(2), which allows an LLC to "prosecute and defend" lawsuits during a wind up period *after* dissolution, but *before* the LLC's certificate of formation is canceled. Given that both provisions remain in effect, and that both are unambiguous, both provisions must be read together and harmonized, so far as possible. Attempting such a harmonization, a person may sue an LLC so long as he or she brings the lawsuit within three years of the LLC's effective date of dissolution, and the LLC's certificate of formation has not yet been canceled. If either prong is not met, the LLC cannot be sued. RCW 25.15.303 thus does not alter RCW 25.15.295(2).

3. Does RCW 25.15.303 apply retroactively?

WSBA Response: Yes. RCW 25.15.303 is remedial in nature, and does not impair a constitutional or vested right. Consequently, although the legislature did not explicitly make RCW 25.15.303 retroactive, RCW 25.15.303 should be applied retroactively.

4. **Do the *Ballard* case and the common law relate to LLCs, and if so, how?**

WSBA Response: While the Act does not specify which body of law the Court should turn to in construing it, both the *Ballard* case and the common law reaffirm the reasonableness and appropriateness of the WSBA's interpretation of RCW 25.15.295(2) and RCW 25.15.303; they therefore apply by compelling legal analogy. They are instructive if not mandatory precedent.

II. IDENTITY AND INTEREST OF *AMICUS* WSBA

The WSBA is an administrative arm of the Washington State Supreme Court. "The mission of the [WSBA] is to promote justice and to serve its members and the public."[1] Under the WSBA Bylaws, the Board of Governors authorizes standing committees to investigate and participate in matters relating to the general purposes of the WSBA.[2] One such standing committee is the WSBA Amicus Committee, which reviews "all requests for *amicus curiae* participation."[3]

On November 22, 2006, the WSBA received a letter from this Court requesting *amicus curiae* briefs addressing several thorny issues pertaining to

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[1] *See* WSBA website at http://www.wsba.org ("WSBA Info" Tab).

[2] WSBA Amicus Curiae Brief Policy at 2 (available at the WSBA website under the Committees" link).

[3] *Id.* at 1.

Limited Liability Companies ("LLCs").[4] The Court specifically requested input from the WSBA Business Law Section and Corporation Law Department Section. Attentive as the WSBA is to promoting justice, "[t]he WSBA will honor a request from an appellate court barring exceptional circumstances."[5] This brief represents the WSBA's efforts to meet that commitment.

The WSBA takes no position as to which parties should prevail or whether any lower court committed errors of fact or law. The WSBA has no interest in the specific outcome of the three subject cases, other than its general interest in seeing justice done and assisting this Court and the public. In the truest sense of the words, then, WSBA acts solely as *amicus curiae*.[6]

III. QUESTIONS PRESENTED BY THE COURT

In its letter of November 22, 2006, and pursuant to RAP 10.6, this Court requested *amicus curiae* briefs addressing the following issues, slightly reordered to make them easier to address *seriatim*:

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[4] *See* Letter of November 22, 2006 from Court Commissioner W. Ellis, submitted as **Exhibit A** of Appendix).

[5] WSBA Amicus Curiae Brief Policy at 2.

[6] Because the WSBA does not align itself with any party before this Court, it does not include Assignments of Error or a Statement of the Case; the former is not required and the later would be redundant with numerous other briefs before this Court, written by persons with a better grasp of the factual context of these disputes. *See* RAP 10.3(e).

1. Whether a certificate of cancellation means something more than a dissolution, and, in particular, the effect of the following language in RCW 25.15.295(2):

> Upon dissolution of a limited liability company and **until the filing of a certificate of cancellation** as provided in RCW 25.15.080, the persons winding up the limited liability company's affairs may, in the name of, and for and on behalf of, the limited liability company, **prosecute and defend suits, whether civil, criminal, or administrative**, gradually settle and close the limited liability company's business, dispose of and convey the limited liability company's property, discharge or make reasonable provision for the limited liability company's liabilities, and distribute to the members any remaining assets of the limited liability company.[7]

2. What remedies are available after dissolution under RCW 25.15.303, and does this section apply only to actions *against* a limited liability company, rather than actions *by* a limited liability company?

3. What is the retroactive effect, if any, of the 2006 amendments to RCW 25.15.303, and what do the amendments mean in the context of a certificate of cancellation?

4. What is the applicability, if any, of *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.*, 158 Wash.2d 603, 146 P.3d 914 (Wash. 2006), to limited liability companies?

5. Whether the common law has any application to limited liability companies, and, if so, how the common law applies?[8]

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[7] RCW 25.15.295(2) (emphasis added).

[8] *See* **Exhibit A** to Appendix for Court's Letter of November 22, 2007, posing these questions.

The WSBA addresses these questions in the order presented here. Questions four and five are addressed together under the fourth heading of the Argument section, since those two questions are closely related.

IV. ARGUMENT

1. The Term "Certificate of Cancellation" Unquestionably Means Something More than "Dissolution" In the Context of RCW 25.15.295(2).

LLCs are recent legal constructs, with a majority of states having only enacted LLC legislation in the 1990s.[9] Washington's Act took effect on October 1, 1994,[10] and Washington case law construing the Act is sparse.[11] "Since limited liability companies have only recently become popular, the law is still evolving."[12] Unhelpfully, courts and scholars routinely comment that LLCs share some qualities of corporations and other qualities of partnerships; they cite by analogy to state corporation acts, to state partnership acts, or to the common law, often without meaningful explanation.[13] From the WSBA's perspective, the only *relatively* sure footing here is the language of the Act itself. The LLC is a creature of statute, not of common law, and our courts of

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[9] William M. Fletcher, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS, § 70.50 (2006 Update).

[10] RCW 25.15.900.

[11] Counsel's search for "helpful" Washington case law on how to construe LLCs turned up a total of six cases, some unpublished and none helpful.

[12] Fletcher at § 70.50.

[13] *See, e.g.*, David M. Hastings, Annotation, *Construction and Application of Limited Liability Company Acts*, 79 A.L.R.5th 689 (2000).

appeals are expert at construing statutes. That is the only way to unravel this puzzle, even if the solution is not fully satisfying.

RCW 25.15.295(2) both preexisted and survived the 2006 amendments to the Act. That provision, which this Court has asked *amicus curiae* to interpret, reads as follows:

> Upon dissolution of a limited liability company and **until the filing of a certificate of cancellation** as provided in RCW 25.15.080, the persons winding up the limited liability company's affairs may, in the name of, and for and on behalf of, the limited liability company, **prosecute and defend suits, whether civil, criminal, or administrative**, gradually settle and close the limited liability company's business, dispose of and convey the limited liability company's property, discharge or make reasonable provision for the limited liability company's liabilities, and distribute to the members any remaining assets of the limited liability company.[14]

The general meaning of this provision is clear. There is a period of time, which the Act styles the "winding up" period, that exists *after* the time the LLC is **dissolved**, but *before* its certificate of formation is **cancelled**. During this winding up period, a manager or other representative, as defined in RCW 25.15.295(1), may prosecute and defend suits in the name of the LLC.

The clear implication is that such representative persons may *no longer* "prosecute and defend suits" after the certificate of formation is canceled. RCW 25.15.295(2) is unambiguous as written and must be given

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[14] RCW 25.15.295(2) (emphasis added) (enacted in 1994).

effect. "Where statutory language is plain, free from ambiguity, and devoid of uncertainty, there is no room for construction because the legislative intention derives solely from the language of the statute."[15] Such is the case with RCW 25.15.295(2).

Under the Act, an LLC is born through the execution of a certificate of formation.[16] This is explained in RCW 25.15.070, which states as follows:

> In order to form a limited liability company, one or more persons must execute a certificate of formation. The certificate of formation shall be filed in the office of the secretary of state and set forth [specified information].
>
> * * * * * *
>
> Unless a delayed effective date is specified, a limited liability company is formed when its certificate of formation is filed by the secretary of state.[17]

An LLC thus springs into existence when its "certificate of formation is filed." It then becomes a new legal person.

Importantly, the Act also specifies how and when an LLC dies:

> A limited liability company formed under this chapter shall be a separate legal entity, the existence of which as a separate legal entity shall continue **until cancellation**

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[15] *Berrocal v. Fernandez,* 155 Wash.2d 585, 590 (2005); *accord Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.*, 146 P.3d 914, 919 (Wash. 2006).

[16] "*An* LLC" rather than "*a* LLC" is the correct English usage, since the rule is that one considers the *sound* not the *spelling* of the word following the indefinite article. *See* William A. Sabin, THE GREGG REFERENCE MANUAL, 252-53 (7th ed. 1994).

[17] RCW 25.15.070.

> **of the limited liability company's certificate of formation.**[18]

The Act thus makes it clear, beyond peradventure, that an LLC ceases to exist ***when its certificate of formation is canceled.*** At that point, it is no longer a "separate legal entity." RCW 25.15.080, in turn, clarifies *how* a certificate of formation is canceled.

RCW 25.15.080 states as follows:

> A certificate of formation **shall be canceled upon the effective date of the certificate of cancellation**, or as provided in RCW 25.15.290 [relating to administrative dissolution and cancellation], or upon the filing of articles of merger if the limited liability company is not the surviving or resulting entity in a merger. **A certificate of cancellation shall be filed in the office of the secretary of state to accomplish the cancellation of a certificate of formation upon dissolution and the completion of winding up of a limited liability company** . . . .[19]

The Act thus unambiguously describes the lifecycle of a Washington LLC. It is born through the filing of a certificate of formation. It then conducts its business until it hits a dissolution event under RCW 25.15.270, such as (1) a specified dissolution date in the certificate of formation, (2) a dissolution event delineated in the LLC agreement, or (3) a unanimous agreement to

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[18] *Id.* (emphasis added).

[19] RCW 25.15.080 (emphasis added). Even in the event of an administrative dissolution under RCW 25.15.285, the LLC continues in existence until the secretary of state cancels the LLC's certificate of formation in two years under RCW 25.15.290.

dissolve.[20] At that point, the LLC is in the process of dissolving; it is dying but not yet dead.

During that post-dissolution process, the LLC continues to exist. However, as discussed above, the LLC is limited to the winding up activities set forth in RCW 25.15.295(2), one of which is to "prosecute and defend" lawsuits.[21] RCW 25.15.080 indicates that a certificate of cancellation should be filed only after "the dissolution and completion of winding up" of an LLC. Once the certificate of cancellation is filed, the LLC is dead.[22] As RCW 25.15.070 puts it, the LLC exists "as a separate legal entity" *until* its certificate of formation is cancelled; then it dies.

Under RCW 25.15.295(2), the LLC can thus sue or be sued during its normal life or following dissolution during its winding up period.[23] But once the certificate of formation is canceled, whether by filing a certificate of cancellation or otherwise, the LLC cannot sue or be sued.

A similar result is reached in the case of an administrative dissolution under RCW 25.15.285. In such a dissolution, the LLC may apply for reinstatement within two years of the effective date of dissolution.[24] If the

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[20] *See* RCW 25.15.270.
[21] RCW 25.15.295.
[22] RCW 25.15.070.
[23] A post-dissolution LLC could also presumably be reinstated or continued during the winding up period prior to the filing of a certificate of cancellation.
[24] RCW 25.15.290(1) & (4).

LLC fails to do so, or if the application to reinstate is denied, the "secretary of state shall cancel the limited liability company's certificate of formation."[25] At this point, the LLC, again, ceases to exist under RCW 25.15.070(2)(c), and it cannot sue or be sued. This is indicated by RCW 25.15.295(2), which authorizes winding up activities after dissolution of the LLC but only *"until the filing of a certificate of cancellation."* After the certificate of cancellation is filed, the LLC is a nullity.

In sum, a "certificate of cancellation" absolutely means something more than "dissolution" under the Act. An event of dissolution begins the process of an LLC's dying, but the LLC can still sue or be sued under RCW 25.15.295(2) *until* the cancellation of its certificate of formation, which ends the LLC's existence.

2. The Unambiguous Language and Legislative History of RCW 25.15.303 Confirm that It Does Not Alter RCW 25.15.295(2).

In 2006, the Washington Legislature passed an amendment to the Act, which became RCW 25.15.303. That provision reads as follows:

> The **dissolution** of a limited liability company does not take away or impair any remedy available against that limited liability company, its managers, or its members for any liability incurred at any time, whether prior to or after dissolution, unless an action or other proceeding thereon is not commenced **within three years after the effective date of the dissolution**. Such an action or

[25] RCW 25.15.290(4).

> proceeding against the limited liability company may be defended by the limited liability company in its own name.[26]

The legislative history surrounding this survival statute suggests that it was passed in response to the court of appeals' decision in *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.*, 126 Wash. App. 285 (Div. I 2005), *aff'd*, 146 P.3d 914 (2006).[27]

In *Ballard*, the court of appeals held that the Washington Business Corporation Act survival statute, RCW 23B.14.340, applies only to claims existing or liability incurred ***prior*** to a corporation's dissolution.[28] The court went on to hold, in light of the legislature's decision not to adopt section 14.07 of the 1984 Revised Model Business Corporation Act, which would have allowed post-dissolution claims, that the plaintiff's claims were barred by the common law rule that claims against corporations terminate when the corporation dissolves.[29] RCW 25.15.303 appears to have been a response to *Ballard*.

But the intent of the legislature is probably irrelevant here, since courts do not look at legislative history if the statutory language is clear and

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[26] RCW 25.15.303 (emphasis added). The *Ballard* case is discussed in more detail below.

[27] House Bill Report, SB 6531 at 3 (2006) (a true and correct copy of which is attached as **Exhibit B** in the Appendix).

[28] *Ballard*, 126 Wash. App. at 290.

[29] *Id.* at 295.

unambiguous.[30] Nevertheless, the legislative history supports the WSBA's position that an LLC cannot be sued after cancellation of its certificate of formation, even under RCW 25.15.330. Here, the legislature chose to create a survival statute based on the *dissolution* of an LLC, instead of on its *cancellation*, even though referring to the latter might have created a more coherent legislative scheme. And the legislative history makes it crystal clear that the legislature knew what it was doing. The House Bill Report for SB 6531, which became RCW 25.15.303, specifically acknowledges the following:

> After dissolution of an LLC, but before cancellation of the certificate of formation, members of the LLC or a court appointed receiver may wind up the business of the LLC. A person winding up the affairs of an LLC may prosecute or defend legal actions in the name of the LLC.[31]

The House Bill Report likewise acknowledges that the Act has "no provision regarding the preservation of claims following cancellation of the certificate of formation."[32] Knowing this, the legislature created RCW 25.15.303 without changing RCW 25.15.070, RCW 25.15.295(2), or any other provision relating to the cancellation of the certificate of formation. Had the legislature wanted, it could have drafted RCW 25.15.303 to directly address how the

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[30] *State v. Grays Harbor County*, 98 Wash.2d 606, 607-08 (1983).
[31] House Bill Report, SB 6531 at 2 (2006).
[32] *Id.* at 3.

provision interlaces with RCW 25.15.295(2). Apparently, the legislature intended that both RCW 26.16.303 and RCW 25.15.295(2) would coexist, and that the latter provision would do so without modification. Such a decision has consequences.

By its terms, RCW 25.15.303 creates rights only in persons who might sue an LLC; it does not create a cause of action for LLCs. The statute states that "dissolution of a limited liability company does not take away or impair any remedy **available against that limited liability company**, its managers, or its members . . . ."[33] RCW 25.15.303 thus plainly applies only to actions *against* an LLC, and not to actions *by* an LLC, as the provision itself indicates. Persons who have claims against an LLC may bring those claims, regardless of when the claim arose, against an LLC so long as they sue the LLC within three years after the effective date of the LLC's dissolution. The difficult question is how to harmonize RCW 25.15.303 with RCW 25.15.295(2).

All provisions in a statute must, so far as possible, be construed so as not to contradict each other.[34] The legislature is presumed to know its own laws. Moreover, a "court may not construe a statute in a way that renders

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[33] RCW 25.15.303 (emphasis added).
[34] *See In re Sherwood's Estate*, 122 Wash. 648, 655-56 (1922).

statutory language meaningless or superfluous."[35] Neither may a court rewrite a statute, merely because it could have been drafted more clearly.[36] Here, giving effect to both RCW 25.15.303 with RCW 25.15.295(2) necessarily leads to the following conclusions:

1. Under the Act, as it currently exists, an LLC can initiate a lawsuit at any time during, before or after its dissolution, so long as its certificate of formation has not been canceled.[37] Once the certificate of formation has been canceled, the LLC no longer exists, and it may not "prosecute and defend suits."

2. Under the Act, as it currently exists, a person may sue an LLC at any time before its dissolution, or for three years following its effective date of dissolution.[38] However, once the LLC's certificate of formation is canceled, the LLC ceases to exist under the Act, and it can no longer sue or be sued.[39] Similarly, if an LLC is administratively dissolved, and not reinstated within two years under RCW 25.15.290, the LLC no longer exists and cannot sue or be sued. In essence, then, a potential plaintiff gets the shorter of (1)

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[35] *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.*, 146 P.3d 914, 918 (Wash. 2006).

[36] *See, e.g., In re Parentage of C.A.M.A.*, 154 Wash.2d 52, 69 (2005).

[37] *See* RCW 25.15.295(2).

[38] RCW 25.15.303.

[39] *See* RCW 25.15.070(2)(c); RCW 25.15.295.

three years from the effective date of an LLC's dissolution, or (2) up to the date of the cancellation of the LLC's formation.

This may not have been what the drafters of RCW 25.15.303 *intended*, but it is a clear and direct consequence of what RCW 25.15.303 *says*. In amending the Act to include RCW 25.15.303, the legislature elected not to change or clarify RCW 25.15.295(2), RCW 25.15.295(2), or any other provision of the Act confirming that an LLC ceases to exist after the certificate of cancellation is filed. The legislature could have easily drafted RCW 25.15.303 to allow suits to be brought even after the filing of a certificate of cancellation, but it chose not to do so. If the legislature now wishes, in retrospect, that RCW 25.15.303 had been drafted differently, the remedy lies with the legislature and not with this Court.

3. Since RCW 25.15.303 is Remedial, It Should be Applied Retroactively, Despite the Legislature's Silence.

The Court requested *amicus curiae* to address whether RCW 25.15.303 should be applied retroactively. Because it is remedial in nature and does not impair a constitutional or vested right, RCW 25.15.303 should be applied retroactively.

Statutes may be applied retroactively, where the legislature *intended* the statute to apply retroactively, the statute is *curative*, or where the statute is

remedial.[40] Regardless, a statute cannot be applied retroactively if doing so would "impair[] a constitutional or vested right."[41] As RCW 25.15.303 is a survival provision, preserving remedies available on dissolution of an LLC, no constitutional rights are implicated. Neither are any vested rights, since "a cause of action that exists only by virtue of a statute is not a vested right."[42] Even more than the right to sue dissolved *corporations*, the right to sue dissolved *LLCs* exists solely as a matter of "legislative grace,"[43] since LLCs did not exist at common law.

Legislative intent may be discerned from the face of the statute,[44] or "from the legislature's enactment of new legislation soon after a controversy arose about interpretation of the statute said to be clarified."[45] Unlike RCW 23B.14.340, which provides for survivorship actions in the corporate context, RCW 25.15.303 contains no explicit direction concerning its retrospective or prospective application. The House and Senate reports on the bill that became RCW 25.15.303 are similarly silent.[46] And while adoption of RCW 25.15.303 and the amendments to RCW 23B.14.340 both came on the heels of the Court

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[40] *1000 Virginia Ltd. v. Vertecs Corp.*, 158 Wash.2d 566, 584 (2006).

[41] *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.*, 146 P.3d 914, 922 (Wash. 2006).

[42] *Id.*

[43] *Id.* at 923.

[44] *See, e.g., id.* at 922.

[45] *1000 Virginia Ltd.*, 158 Wash.2d at 584.

[46] *See* House Bill Report, SB 6531 (2006); Senate Bill Report, SB 6531 (2006).

of Appeals' *Ballard* decision, neither provision clarified the interpretation of specific aspects of the applicable statutes: with the adoption of RCW 23B.14.340, the legislature expanded the remedies available against corporations to those arising after dissolution; with the adoption of RCW 25.15.303, the legislature created a new cause of action entirely. Thus, RCW 25.15.303 is not curative in nature, as a curative statute is one that "clarif[ies] ambiguities in older legislation without changing prior case law."[47]

But the Court need not evaluate whether RCW 25.15.303 is curative or was intended by the legislature to be retroactive, because RCW 25.15.303 is remedial. "A statute is remedial when it relates to practice, procedure, or remedies and does not affect a substantive or vested right."[48] By affording parties an opportunity to seek remedies against an LLC, its managers, or its members at any time within three years of the LLC's dissolution, RCW 25.15.303 relates to remedies. For this reason, the WSBA believes that RCW 25.15.303 should be applied retroactively.

4. The *Ballard* Case and the Common Law Both Confirm WSBA's Interpretation of RCW 25.15.295(2).

In its Letter of November 22, 2006, the Court also asked whether (1) *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.*, 146 P.3d 914

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[47] *Washington Waste Sys., Inc. v. Clark County*, 115 Wash.2d 74, 78 (1990).
[48] *1000 Virginia Ltd.*, 158 Wash.2d at 586.

(Wash. 2006), or (2) the "common law" applies to LLCs, and – if so – how?[49] WSBA's answer is that the Act does not specify whether one should look to the corporations law, partnership law, or the common law in construing the Act. However, the *Ballard* case and the common law reaffirm the reasonableness and appropriateness of WSBA's interpretation of RCW 25.15.295(2) and RCW 25.15.303; they therefore apply by compelling legal analogy.

In *Ballard*, plaintiff condominium association sued defendant condo developer corporation for breach of contract after the condos began to spring leaks as a result of "defects in the exterior walls and stucco system."[50] Although work on the development ended in 1992, and the condo developer dissolved in 1995, the association did not bring suit until 2002. The developer defended on the grounds of untimeliness, as well as on the grounds that, under the Washington Business Corporation Act ("Business Corporation Act") and at common law, a corporation could not be sued once it ceased to exist.[51] Accepting defendant's argument, the trial court dismissed the association's case on summary judgment.

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[49] The WSBA combines two of the Court's questions here, because they share the same answer. (*See* **Exhibit A** to Appendix).

[50] *Ballard*, 146 P.3d at 916.

[51] *Id.* at 917.

The court of appeals affirmed. In so doing, the court considered both (1) a winding up provision (RCW 23B.14.050), and (2) a survival provision (RCW 23B.14.340) from the Business Corporation Act.[52] The winding up provision, RCW 23B.14.050, "states that a dissolved corporation carries on its existence but may not carry on any business except that appropriate to wind up and liquidate its business affairs."[53] By its terms, the winding up provision applies only during the winding up period; it provides no authority for suing the corporation after articles of dissolution are filed and *it ceases to exist.*[54] The court's reasoning is precisely analogous to the WSBA's view of RCW 25.15.295(2), which allows an LLC to "prosecute and defend" lawsuits during the winding up period, but not after. Since the defendant corporation in *Ballard* had ceased to exist long before plaintiff association brought suit, RCW 23B.14.050 offered the association no refuge.

The court of appeals next considered RCW 23B.14.340, as it existed before the 2006 amendments. At the time, the provision stated that a corporation's dissolution "shall not take away or impair any remedy available against such corporation . . . for any right or claim *existing*, or any liability *incurred*, *prior to* such dissolution if action or other proceeding thereon is

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[52] *Ballard*, 126 Wash. App. at 289-91.
[53] *Id.* at 289 (citing RCW 23B.14.050).
[54] *Id.* at 295-96.

commenced within two years after the date of such dissolution."[55] Since the association's cause of action in *Ballard* accrued *after*, not *before* the corporation's dissolution, RCW 23B.14.340, the survival statute, was likewise inapplicable.[56] With no statute applying to the post-wind up fact pattern in *Ballard*, the court of appeals devolved to the common law, under which a lawsuit cannot be brought against an entity that no longer exists.

Following the court of appeals' decision, the Washington State Legislature enacted SB 6531 to provide a three-year survival period for claims against LLCs. This law became codified as RCW 25.15.303, discussed above. While the cases at issue here were still pending, the supreme court issued its decision in *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.*, 158 Wash.2d 603, 146 P.3d 914 (2006). Apparently believing it was disagreeing with the court of appeals, the supreme court found that the Business Corporation Act winding up provision, RCW 23B.14.050, allowed post-dissolution suits.[57]

In fact, the court of appeals in *Ballard* never disagreed with that assertion; its holding was that RCW 23B.14.050 did not allow suits *after the*

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[55] *Id.* at 290 (emphases added).
[56] *Id.*
[57] *Ballard,* 146 P.3d at 920-21.

corporation had ceased to exist, as opposed to after dissolution.[58] Consonant with the WSBA's analysis of the Act, the court of appeals (and the concurrence in the supreme court) concluded that a suit could be maintained against a dying corporation, but not against a dead one. Put another way, RCW 23B.14.050 simply does not address "claims arising after a corporation has completed the winding up process."[59] Regardless, the issue became *obiter dictum* when the supreme court applied the 2006 amendments to the survival provision (RCW 23B.14.340) and concluded that the association's lawsuit was untimely, since it was not brought within three years of the developer's dissolution.[60]

In summary, the WSBA cannot say that *Ballard* is mandatory precedent in these cases, since the WSBA is unaware of any cases clearly stating that where the Act is silent, courts look to the common law. LLCs are creatures of statute; they did not exist at common law. What can be said, however, is that the *Ballard* decisions, particularly the court of appeals and concurring supreme court decisions, demonstrate legally analogous reasoning to that arrived at by the WSBA in this matter. For example, the *Ballard* cases, like the common law, faithfully reaffirm the notion that a defunct entity

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[58] *Ballard*, 126 Wash. App. at 295-96; *see also Ballard,* 146 P.3d at 923-24 (Sanders, J. concurring)(majority incorrectly assumes that, prior to 2006 amendments, plaintiff could have maintained a suit against a defunct corporation).

[59] *Id.*

[60] *Ballard*, 146 P.3d at 921.

cannot sue or be sued. Both *Ballard* and the common law are thus persuasive and worthy of consideration, even though the unambiguous language of the Act dictates the outcome in these cases, far more than references to case law governing other types of legal entities.

V. CONCLUSION

A Washington LLC is born through filing of a certificate of formation. During its natural life, it can sue or be sued. After dissolution, the LLC is not dead but dying. Under RCW 25.15.295(2), it can still "prosecute or defend" lawsuits. Once its certificate of formation is canceled, however, whether through (1) filing of a certificate of cancellation, or (2) failure to apply for reinstatement within two years of an administrative dissolution, the LLC is dead. It can no longer sue or be sued. It does not exist. As at common law, the "dead know not the law."

The 2006 amendment to the Act, codified in RCW 25.15.303, does little to mitigate the effects of RCW 25.15.295(2). RCW 25.15.303 creates a three-year survival statute, measured from the effective date of dissolution. Although legislative history confirms that the legislature understood that an LLC ceases to exist when its certificate of formation is cancelled, RCW 25.15.303 is silent about whether a suit can be initiated after an LLC ceases to exist. Neither do the 2006 amendments alter the signal implications of RCW

25.15.295(2), namely that an LLC cannot continue activities such as "prosecuting or defending" a suit, once its certificate of formation is canceled.

RCW 25.15.303 should, however, be applied retroactively. Since it is remedial in nature and does not impair constitutional or vested rights, RCW 25.15.303 is retroactive, even though the legislature did not favor the public or this Court with explicit guidance in that regard.

Respectfully submitted,

Dated: February 9, 2007

Paul H. Beattie, WSBA No. 30277
Elizabeth A. Richardson, WSBA No. 38375
Darby & Darby, P.C.
1191 Second Avenue, 20th Floor
Seattle, WA 98101-3404
Phone: (206) 262-8922
Fax: (206)262-8901
Email: pbeattie@darbylaw.com

Ellen Conedera Dial, WSBA No. 9522
Washington State Bar Association
1325 Fourth Avenue, Suite 600
Seattle, WA 98101-2539
Phone: (206) 727-8232

Chris Brown, WSBA No. 28526
Garvey Schubert Barer
1191 Second Avenue
Seattle, WA 98101

Attorneys for *Amicus Curiae*
Washington State Bar Association

APPENDIX A

[Optional. See rule 10.3(a)(7).]

APPENDIX B
[Optional. See rule 10.3(a)(7).]

EXHIBIT A

Letter of November 22, 2006 from Court Commissioner W. Ellis

WILLIAM H. ELLIS, Court Commissioner
Division One
One Union Square
600 University Street
Seattle, Washington 98101

The Court of Appeals
of the
State of Washington

464-7649
AREA CODE 206

November 22, 2006

Washington State Trial
Lawyers Assoc.
1809 7th Avenue, Ste 1500
Seattle, WA 98101-1328

✓ Washington State Bar Assoc.
Amicus Brief Committee
2101 Fourth Avenue, 4th Floor
Seattle, WA 98121

John Phillip Evans
Mary H. Spillane
Margaret A. Sundberg
Williams Kastner & Gibbs PLLC
601 Union Street, Ste 4100
Two Union Square Bldg.
Seattle, WA 98101-2380

Richard Scott Fallon
Attorney at Law
1111 Third Avenue, Ste 2400
Seattle, WA 98101-3238

Martin T. Crowder
Michaelanne Ehrenberg
Karr Tuttle Campbell
1201 Third Avenue, Ste 2900
Seattle, WA 98101-3028

Robert Kendall Goff
Daniel J. De Walt LLP
Goff & DeWalt
3226 Rosedale Street, Ste 100
Gig Harbor, WA 98335-1806

Eileen I. McKillop
Oles Morrison Rinker & Baker LLP
701 Pike Street, Ste 1700
Seattle, WA 98101-3930

Building Industry Assoc. of
Washington
P.O. Box 1909
111 West 21st Avenue
Olympia, WA 98507

Washington Defense Trial Lawyers
Two Union Square
601 Union Street, Ste 4100
Seattle, WA 98101

John Patrick Hayes
Viivi Vandersiice
Forsberg & Umlauf
900 4th Avenue, Ste 1700
Seattle, WA 98164-1050

James Benjamin Meade, II
Forsberg & Umlauf
950 Pacific Avenue, Ste 400
Tacoma, WA 98402-4441

Jonathan Dirk Holt
Anthony Robert Scisciani, III
Scheer & Zehnder LLP
701 Pike Street, Ste 2200
Seattle, WA 98101-2358

William Scott Clement
John E. Drotz
Clement & Drotz
2801 Alaskan Way, Ste 300
Pier 70
Seattle, WA 98121-1128

Mark Edward Mills
Susan Kate Fuller
Law Offices of William D. Garcia
1601 Fifth Avenue, Ste 1210
Seattle, WA 98101-3602

Nos. 56879-5-I, 58825-7-I, and 58796-0-I

Mark Gregory Honeywell
David B. Jensen
Michelle Menely
Gordon Thomas Honeywell
600 University Street, Ste 2100
One Union Square Bldg.
Seattle, WA 98101-4161

Leonard D. Flanagan
Justin D. Sudweeks
Levin & Stein
201 Queen Anne Avenue North
Ste 400
Seattle, WA 98109-4824

RE: No. 56879-5-I, Grateful Siding, Inc. v. Roosevelt, LLC & Steinvall, Inc.
No. 58825-7-I, Colonial Dev. LLC v. Emily Lane Homeowners
No. 58796-0-I, Chadwick Farms v. F.H.C.

Dear Counsel:

The Court has before it three cases dealing with Limited Liability Companies and their capacity to sue or be sued under chapter 25.15 RCW. The cases are Grateful Siding v. Roosevelt, LLC, number 56879-5 (consolidated with number 56970-8); Chadwick Farms v. F.H.C., number 58796-0; and Colonial Devl. LLC v. Emily Lane, number 58825-7.

Pursuant to RAP 10.6(c), the Court requests amicus curiae briefs addressing the following issues:

1. The applicability, if any, of Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co., 2006 Wash. LEXIS 875 (Number 76938-9, filed November 9, 2006) to limited liability companies;
2. What remedies are available after dissolution under RCW 25.15.303 and whether the section applies only to actions against a limited liability company, rather than actions by a limited liability company;
3. Whether a certificate of cancellation means something more than a dissolution, and, in particular, the effect of the following language in RCW 25.15.295(2):

   > Upon dissolution of a limited liability company and until the filing of a certificate of cancellation as provided in RCW 25.15.080, the persons winding up the limited liability company's affairs may, in the name of, and for and on behalf of, the limited liability company, prosecute and defend suits, whether civil, criminal, or administrative, gradually settle and close the limited liability company's business, dispose of and convey the limited liability company's property, discharge or make reasonable provision for the limited liability company's liabilities, and distribute to the members any remaining assets of the limited liability company. (Emphasis added).

4. What is the retroactive effect, if any, of the 2006 amendments to RCW 25.15.303, and what the amendments mean in the context of a certificate of cancellation;

Nos. 56879-5-I, 58825-7-I, and 58796-0-I

5. Whether the common law has any application to limited liability companies, and, if so, how the common law applies.

The Court invites amicus curiae briefs from the following organizations:

1. Washington State Bar Association Corporate/Business Law Sections;
2. Building Industry Association of Washington;
3. Washington State Trial Lawyers' Association; and
4. Washington Defense Trial Lawyers

Any amicus curiae briefs should be filed no later than December 22, 2006 and served on the counsel of record for each of the parties in the three cases listed above. Any response should be filed and served no later than January 22, 2007. The amicus curiae briefs and the responses should not exceed 25 pages in length.

Chadwick Farms v. F.H.C., number 58796-0; and Colonial Devl. LLC v. Emily Lane, number 58825-7, which are presently set for consideration on January 23, 2007, shall be re-scheduled for argument on February 13, 2007, at 1:30 p.m. The present briefing schedule for Colonial Devl. LLC v. Emily Lane, number 58825-7, shall remain in place.

Sincerely,

William H. Ellis
Court Commissioner

EXHIBIT B
Washington House of Representatives,
House Bill Report for SB 6531 (2006)

HOUSE BILL REPORT
SB 6531

As Passed House:
February 28, 2006

Title: An act relating to preserving remedies when limited liability companies dissolve.

Brief Description: Preserving remedies when limited liability companies dissolve.

Sponsors: By Senators Weinstein, Fraser and Kline.

Brief History:
Committee Activity:
Judiciary: 2/20/06 [DP].
Floor Activity:
Passed House: 2/28/06, 97-0.

Brief Summary of Bill

- Provides a three year period following dissolution of a limited liability company during which the dissolution of the company does not extinguish any cause of action against the company.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass. Signed by 9 members: Representatives Lantz, Chair; Flannigan, Vice Chair; Williams, Vice Chair; Priest, Ranking Minority Member; Rodne, Assistant Ranking Minority Member; Campbell, Kirby, Springer and Wood.

Staff: Bill Perry (786-7123).

Background:

A limited liability company (LLC) is a business entity that possesses some of the attributes of a corporation and some of the attributes of a partnership.

Attributes of Corporations and LLCs
Corporations are creatures of statutory law and are created only by compliance with prescribed formal procedures. A corporation is managed by directors and officers, but is owned by shareholders who may have very little direct role in management. Generally, ownership shares are transferable, and each shareholder is liable for corporate debts only to the extent of his or her own investment in the corporation. A corporation is treated as a taxable entity.

General partnerships, on the other hand, are business entities recognized as common law that require no formal creation, and are owned and managed by the same individuals who are each liable for the debts of the partnership. A general partnership is not a taxable entity.

The LLCs were authorized by the Legislature in 1994. An LLC is a noncorporate entity that allows the owners to participate actively in management, but at the same time provides them with limited liability. The Internal Revenue Service has ruled that an LLC with attributes that make it more like a partnership than a corporation may be treated as a non-taxable entity.

A properly constructed LLC, then, can be a business entity in which the ownership enjoys the limited liability of a corporation's shareholders, but the entity itself is not taxed as a corporation.

Dissolution of an LLC

An LLCs may be dissolved in a number of ways, including:

- reaching a dissolution date set at the time the LLC was created;
- the occurrence of events specified in the LLC agreement as causing dissolution;
- by mutual consent of all members of the LLC;
- the dissociation of all members through death, removal or other event;
- judicial action to dissolve the LLC; or
- administrative action by the Secretary of State for failure of the LLC to pay fees or to complete required reports.

Certificate of Cancellation

After an LLC is dissolved, or if an LLC has been merged with another entity and the new entity is not the LLC, the certificate of formation that created the LLC is cancelled.

Cancellation may occur in a number of ways:

- The certificate of formation may authorize a member or members to file the certificate of cancellation upon dissolution, or after a period of winding up the business of the LLC.
- A court may order the filing of a certificate of cancellation.
- In the case of a merger that results in a new entity that is not the LLC, the filing of merger documents must include the filing of a certificate of cancellation.
- In the case of an administrative dissolution of an LLC, there is a two year period during which the LLC may be reinstated before the secretary of state files the certificate of cancellation.

After dissolution of an LLC, but before cancellation of the certificate of formation, members of the LLC or a court appointed receiver may wind up the business of the LLC. A person winding up the affairs of an LLC may prosecute or defend legal actions in the name of the LLC.

Preservation of Remedies

The law governing LLCs has no express provision regarding the preservation of remedies or causes of actions following dissolution of the business entity. There is an implicit recognition of the preservation of at least an already filed claim during the wind up period following dissolution, since the person winding up the affairs is authorized to defend suits against the

LLC. However, there is no provision regarding the preservation of claims following cancellation of the certificate of formation.

The current Business Corporation Act provides that dissolution of a corporation does not eliminate any claim against the corporation that was incurred prior to dissolution if an action on the claim is filed within two years after dissolution. There is no "certificate of cancellation" necessary to end a corporation. *(Note: Another currently pending bill, SSB 6596, would increase this two year period to three years, and would make the provision apply to claims incurred before or after dissolution.)*

Summary of Bill:

Dissolution of a limited liability company will not eliminate any cause of action against the company that was incurred prior to or after the dissolution if an action on the claim is filed within three years after the effective date of the dissolution.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

Testimony For: A recent court decision has left many homeowners without a remedy for claims against a dissolved corporation. The same problem exists with respect to claims against LLCs. The Bar Association is working on a comprehensive review of the LLC law, but it is not done yet. This bill addresses only the problem of survival of claims following dissolution.

The bill is a step in the right direction. It affirmatively states that claims, such as homeowners' warranty claims, will survive the dissolution of an LLC. Whether or not there are any assets left to satisfy a claim is a separate problem that will have to be addressed later.

Testimony Against: None.

Persons Testifying: Senator Weinstein, prime sponsor; Alfred Donohue, Forsberg Umlauf, P.S.; and Sandi Swarthout and Michelle Ein, Washington Homeowners Coalition.

Persons Signed In To Testify But Not Testifying: None.

CERTIFICATE OF SERVICE

I, Marlon Muñoz, hereby certify that on February 12, 2007, I served the attached **BRIEF OF *AMICUS CURIAE* WASHINGTON STATE BAR ASSOCIATION**, by U.S. First-Class Mail on the following parties/persons below:

Washington State Bar Association Amicus Brief Committee 2101 fourth Avenue, 4th Floor Seattle, WA 98121	Building Industry Assoc. of Washington 111 West 21st Avenue PO Box 1909 Olympia, WA 98507
Washington State Trial Lawyers Assoc. 1809 Seventh Avenue, Ste. 1500 Seattle, WA 98101-1328	Washington Defense Trial Lawyers Two Union Square, Ste. 4100 601 Union Street Seattle, WA 98101
John Phillip Evans Mary H. Spillane Margaret A. Sundberg Williams Kastner & Gibbs PLLC Two Union Square, Ste. 4100 601 Union Street Seattle, WA 98101-2380	John Patrick Hayes Viivi Vanderslice Forsberg & Umlauf 900 Fourth Avenue, Ste. 1700 Seattle, WA 98164-1050
Richard Scott Fallon Attorney at Law 1111 Third Avenue, Ste. 2400 Seattle, WA 98101-3238	James Benjamin Meade, II Forsberg & Umlauf 950 Pacific Avenue, Ste. 400 Tacoma, WA 98402-4441
Martin T. Crowder Michaelanne Ehrenberg Karr Tuttle Campbell 1201 Third Avenue, Ste. 2900 Seattle, WA 98101-3028	Jonathan Dirk Holt Anthony Robert Scisciani, III Scheer & Zehnder LLP 701 Pike Street, Ste. 2200 Seattle, WA 98101-2358

Robert Kendall Goff Daniel J. DeWalt LLP Goff & DeWalt 3226 Rosedale Street, Ste. 100 Gig Harbor, WA 98335-1806	William Scott Clement John E. Drotz Clement & Drotz 2801 Alaskan Way, Ste. 300 Pier 70 Seattle, WA 98121-1128
Eileen I. McKillop Oles Morrison Rinker & Baker LLP 701 Pike Street, Ste. 1700 Seattle, WA 98101-3930	Mark Edward Mills Susan Kate Fuller Law Offices of William D. Garcia 1601 Fifth Avenue, Ste. 1210 Seattle, WA 98101-3602
Mark Gregory Honeywell David B. Jensen Michelle Menely Gordon Thomas Honeywell 600 University Street, Ste 2100 One Union Square Bldg. Seattle, WA 98101-4161	Leonard D. Flanagan Justin D. Sudweeks Levin & Stein 201 Queen Anne Avenue North, Ste 400 Seattle, WA 98109-4824

DATED: February 12, 2007

Marlon Muñoz
for Paul H. Beattie, WSBA No.30277
DARBY & DARBY P.C.
1191 Second Avenue
Seattle, WA 98101
Phone: 206.262.8900
Fax: 206.262.8901

APPENDIX C

No. 58825-7

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

EMILY LANE HOMEOWNERS ASSOCIATION,
a Washington nonprofit corporation,

Respondent/Cross-Appellant,
v.

COLONIAL DEVELOPMENT, LLC,
a Washington limited liability company,

Appellant/Cross-Respondent,

THE ALMARK CORPORATION; a Washington corporation; CRITCHLOW HOMES, INC., a Washington corporation; MARK B. SCHMITZ, an individual; RICHARD E. WAGNER and ESTHER WAGNER d/b/a WOODHAVEN HOMES, individuals; ALFRED J. MUS, an individual; and JEFFREY CRITCHLOW, an individual,

Respondents.

ANSWER OF APPELLANT/CROSS-RESPONDENT COLONIAL DEVELOPMENT, LLC TO WSBA'S AND WSTLA FOUNDATION'S AMICUS CURIAE BRIEF

Eileen I. McKillop, WSBA 21602
Attorneys for Appellant/Cross-Respondents
OLES MORRISON RINKER & BAKER LLP
701 PIKE STREET, SUITE 1700
SEATTLE, WA 98101-3930
PHONE: (206) 623-3427
FAX: (206) 682-6234

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State Statutes

Books and Other Materials

I. INTRODUCTION

The Washington State Trial Lawyers Association Foundation ("WSTLA") and the Washington State Bar Association ("WSBA") have each filed an amicus curiae brief on the issue of the application of the Limited Liability Company Act and RCW 25.15.303 to claims against a limited liability company after dissolution and after its certificate of formation has been cancellation. On the one hand, the WSTLA argues that the cancellation of a limited liability company's certificate of formation does not result in abatement of any claims against an LLC. On the other hand, the WSTLA argues that RCW 25.15.303 fills a recognized gap in that there is no provision regarding the preservation of claim following cancellation of the certificate of formation.

The most obvious reason the WSTLA's arguments are not credible is that the plain language of Washington's Limited Liability Companies Act expressly states that a limited liability company may only prosecute and defend suits until the filing of a certificate of cancellation. RCW 25.15.296(2). Moreover, the Act also states that a limited liability company ceases to exist as a separate legal

entity upon cancellation of the LLC's certificate of formation. RCW 25.15.070(2)(c).

The WSTLA's second premise that RCW 25.15.303 is retroactive and allows claims to be filed against a cancelled LLC is also unsupported. The Limited Liability Company Act treats the dissolution and cancellation of an LLC differently. After an LLC dissolves, it continues to exist for the purposes of winding up the LLC's affairs as set forth in RCW 25.15.295(2). During the winding up period, the LLC may "prosecute and defend" lawsuits. RCW 25.15.295(2). However, once a certificate of cancellation is filed, the LLC ceases to exist as a legal entity and may not prosecute or defend any claims. The legislature chose to create a new survival statute for claims *against* a dissolved LLC, and chose not to amend RCW 25.15.070(2)(c) or RCW 25.15.295(2), which plainly do not allow any claims against a cancelled LLC.

II. ARGUMENT

A. THE RIGHT TO BRING CLAIMS AGAINST A LIMITED LIABILITY COMPANY IS NOT GOVERNED BY THE *BALLARD SQUARE* DECISION OR THE COMMON LAW.

Both the WSTLA and WSBA claim that the *Ballard Square* decision and the common law apply to a limited liability company and the LLC Act by analogy because, it their view, the decision

concerns "a survival provision analogous to RCW 25.15.303 in purpose and effect" and "is compelling legal analogy." Both premises are false.

The legal status of limited liability companies in Washington is governed by statute, not the common law. Nowhere in the Act is there any provision that an LLC is governed by the common law. In fact, RCW 25.15.800(1) states that the rule that statutes in derogation of the common law are to be strictly construed shall have no application to his chapter. This means that the common law *should not* be considered in construing the Act.

At common law, the legal existence of a corporation was terminated upon dissolution. *Ballard Square Condominium Owners Ass'n v. Dynasty Const. Co.*, 158 Wn.2d 603, 609, 146 P.3d 914 (2006). The *Ballard Square* court explained that at common law, corporation's capacity to sue or be sued was completely destroyed upon dissolution. *Id.* at 609. Today, all jurisdictions have enacted corporate-survival statutes that abrogate the harsh effect of the common-law rule by permitting corporations to sue and be sued as part of their winding up activities. Washington's corporate survival statute, RCW 23B.14.340, allows a claimant to sue a dissolved

corporation for three years after its dissolution, which he could not do at common law.

The court in *Ballard Square* interpreted the language of RCW 23B.14.050 and the other statutes in Chapter 23B.14 RCW relating to suits against a dissolved corporation and ruled that a postdissolution claim against a dissolved corporation was authorized under former RCW 23B.14.050(2)(e). *Ballard Square*, 158 Wn.2d 603, 614, 146 P.3d 914 (2006). The court in *Ballard Square* found that the amendment to RCW 23B.14.340, on its face, is retroactive and allows post-dissolution claims against a dissolved corporation if suit is filed within two years of dissolution. *Ballard Square*, 158 Wn.2d at 616.

Unlike corporations and partnership, a limited liability company and its members are not governed by the common law and do not have common law rights. For example, members of a limited liability company do not have common-law rights to an accounting. Any such rights must be granted either by statute of in the agreement the parties make. A suit against a dissolved LLC is a statutory claim, and a plaintiff must accept the restraints of a statutory claim along with its benefits.

The Limited Liability Company Act did not contain a survival statute for the provision of any claims against a dissolved LLC, much less a cancelled LLC. However, Washington's Business Corporate Act did contain a survival statute for claims against a dissolved corporation which existed prior to dissolution. The *Ballard Square* court interpreted RCW 23B.14.050(2)(e) and the other statutes in Chapter 23B.14 RCW and found that, when read together, allow a postdissolution suit against a dissolved corporation. However, in 2006, the legislature amended RCW 23B.14.340 which, on its face, indicated it was retroactive and allowed postdissolution claims to be commenced within two years after a corporation's dissolution. The *Ballard Square* court's decision was based on an entirely different statute. The analysis with respect to the survival of any claims against a cancelled LLC under the Limited Liability Company Act and RCW 25.15.303 are different than the analysis of the survival of claims against a corporation under Washington Business Corporate Act and RCW 23B.14.340.

The only relevance the *Ballard Square* decision and the amendment to RCW 23B.14.340 has on this case is that the Legislature chose not to include the same express language

regarding retroactivity in RCW 25.15.303, which suggests its intent to not make RCW 25.15.303 apply retroactively.

B. THE LIMITED LIABILITY COMPANY ACT HAS NO PROVISION FOR THE SURVIVAL OF ANY CLAIMS AGAINST A CANCELLED LIMITED LIABILITY COMPANY.

The WSTLA claims that although an LLC is no longer a separate legal entity after the cancellation of its certificate of formation under RCW 25.15.070(2)(c), other provisions in Chapter 25.15 RCW "anticipate that a LLC must respond to legal action even after dissolution procedures, including cancellation, are complete." The WSTLA points to RCW 25.15.285(4), RCW 25.15.335(1), and RCW 25.15.410(1) to support its position. However, RCW 25.15.285(4) only applies to administratively "dissolved" corporations, not cancelled LLC's, and provides that the administrative dissolution of a LLC does not terminate the authority of its registered agent. This makes sense since even an administratively dissolved LLC may sue or be sued until its certificate of formation has been cancelled. RCW 25.15.285(3) and RCW 25.15.295(2).

RCW 25.15.335 only applies to foreign LLC's who cancel their registration with the Secretary of State. RCW 25.15.335 does not apply to a domestic LLC who files a certificate of cancellation

pursuant to RCW 25.15.080. RCW 25.15.410 applies when a merger takes effect between a partnership, limited liability company, limited partnership, or corporation. Nowhere in RCW 25.15.410 does it state that the partnership, limited liability company, limited partnership or corporation that was merged into the surviving entity must file a certificate of cancellation. RCW 25.15.410 merely allows a pending lawsuit against the merged entity to be continued as if the merger did not occur.

Both RCW 25.15.070(2)(c) and RCW 25.15.295(2) survived the 2006 amendments to the Act. RCW 25.15.295(2) provides that upon dissolution of the LLC and "until the filing of a certificate of cancellation" the persons winding up the LLC's affairs may prosecute and defend suits. Thus, the language of the statute clearly provides that upon dissolution, *and until its certificate of formation has been cancelled*, a dissolved LLC may sue and be sued. The language of RCW 25.15.295, read together with RCW 25.15.070, plainly do not allow suits by or against an LLC after its certificate of formation has been cancelled.

C. RCW 25.15.303 DOES NOT APPLY TO A CANCELLED LLC AND ONLY ALLOWS CLAIMS AGAINST A DISSOLVED LLC.

The Act makes it clear that an LLC ceases to exist, for all purposes, upon the cancellation of its certificate of formation. RCW 25.15.070(2)(c). However, upon the dissolution of a LLC and *until* the filing of a certificate of cancellation, it still exists for purposes of winding up the LLC's affairs and may "prosecute and defend" lawsuits. RCW 25.15.295(2). Thus, an LLC may sue or be sued following its dissolution and during its winding up period. However, after its certificate of formation is cancelled, the LLC can not sue or be sued.

RCW 25.15.303 provides that the *dissolution* of a LLC does not take away or impair any remedy against the LLC for any right or claim existing, whether prior to or after *dissolution*, unless an action is commenced within three years after the effective date of dissolution. The legislative history makes it clear that the legislature intended SB 6531 to only apply to dissolved LLCs. House Bill specifically acknowledges that the law governing LLCs has no express provision regarding the preservation of remedies or causes of action following dissolution of the business entity. House Bill Report, SB 6531 at 2 (2006). At the same time, the House Bill

also acknowledges that is no preservation of claims following the cancellation of the certificate of formation. House Bill Report, SB 6531 at 3 (2006). Here, the Legislature chose to create a survival statute based on the *dissolution* of the LLC, and not the cancellation of the LLC. Had the Legislature wanted Senate Bill 6531 to preserve claims against a cancelled LLC, it would have used the work "cancelled", as opposed to "dissolved". The Legislature enacted RCW 25.15.303 without amending RCW 25.15.070(2)(c) or RCW 25.15.295(2). This court should assume that the Legislature means exactly what it says. *State v. Freeman*, 124 Wn. App. 413, 415, 101 P.3d 878 (2004). There is no statutory basis to permit the Emily Lane HOA's claims against Colonial Development, LLC or its members.

D. RCW 25.15.303 IS NOT RETROACTIVE BECAUSE IT CREATES A NEW SUBSTANTIVE RIGHT AGAINST A CANCELLED LIMITED LIABILITY COMPANY.

The WSTLA and WSBA claim that RCW 25.15.303 is retroactive because it is remedial and does not impair a constitutional or vested right. However, neither the WSTLA nor the WSBA have addressed the issue of whether RCW 25.15.303 affects a substantive right. Both WSTLA and WSBA merely

conclude that since the Legislature adopted SB 6531 and SB 6596 at the same time, then RCW 25.15.303 must be remedial.

A statute is remedial when it relates to practice, procedure or remedies, and does not affect a substantive or vested right. *Miebach v. Colasurdo*, 102 Wn.2d 170, 181, 685 P.2d 1074 (1984). The Supreme Court of Washington has described "remedial" statutes as those that "afford a remedy, or better or forward remedies already existing for the enforcement of rights and the redress of injuries." *Haddenham v. State*, 87 Wn.2d 145, 148, 550 P.2d 9 (1976) (holding that the crime victims compensation act, which compensated innocent victims of criminal acts, was an attempt to "remedy" that situation and therefore applied retroactively); *see also Marine Power & Equipment Co. v. Human Rights Comm'n Hearing Tribunal,* 39 Wn. App. 609, 617, 694 P.2d 697 (1985) (holding amendment to statute permitting administrative body to award up to $1000 in damages in discrimination cases applied retroactively because it created "a supplemental remedy for enforcement of a preexisting right").

Procedural laws prescribe a method of enforcing a previously existing substantive right and relate to the form of the proceeding or the operation of laws. Substantive laws establish

new rules, rights, and duties, or change existing ones. Black's Law Dictionary 1429 (6th ed. 1990). Remedial statutes better or forward remedies already existing for the enforcement of rights. That the Legislature acted to create a survival statute for claims against a dissolved LLC did not render the amendment codified at RCW 25.15.303 "remedial" for purposes of retroactivity. Rather, the amendment prospectively granted a new substantive right to bring claims against a dissolved LLC. When a statute brings about a chance in substantive rights, it is presumed to apply prospectively only. *In re F.D. Processing*, 119 Wn.2d. 452, 460, 832 P.2d 1303 (1992).

In *Olesen v. State*, 78 Wn. App. 910, 899 P.2d 837 (1995), the court addressed a similar issue and concluded that an amendment modifying the right to pension survivor benefits did not apply retroactively. In *Olesen v. State*, a fire fighter's widow whose monthly benefits ceased upon her remarriage appealed for reinstatement of surviving spouse benefits when, two years later, a statutory amendment removed remarriage as a bar. Applying the three-step retroactivity analysis under *In re F.D. Processing*, 119 Wn.2d at 460, the court determined that the amendment contained no language expressly calling for retroactivity; that it was not

curative because the previous statute was unambiguous; and that the amendment was not remedial. The Court ruled that rather than merely providing procedural enhancements to the enforcement of an existing right, the Legislature chose to prospectively modify a substantive right. *Olesen*, 78 Wn. App. at 910; see also *Agency Budget Corp. v. Washington Ins. Guar. Ass'n.*, 93 Wn.2d 416, 419-20, 610 P.2d 361 (1980) (1976 amendment to RCW 48.32.030(4) creating new cause of action prospective only; *Hammack v. Monroe St. Lumber Co.*, 54 Wn.2d 224, 228-30, 3399 P.2d 684 (1959) (statutory amendment to industrial insurance act providing for third party liability dealt exclusively with substantive rights and applied prospectively).

Here, RCW 25.15.303 was a legislative choice to create a new substantive right, rather than as a procedural means to enforce an existing right. RCW 25.15.303 does not "better or forward" an existing remedy to recover damages against a dissolved LLC. In other jurisdictions where the same general rules of statutory construction are followed, amendments to statutes increasing liability have been denied retroactive operation. *See, e.g.*, *Field v. Witt Tire Co. of Atlanta, Ga.*, 200 F.2d 74 (1952); *Monroe v. Chase*, 76 F. Supp. 278 (1947); *Regan v. Davis*, 290 Pa. 167, 138 A. 751

(1927); *Keeley v. Great Northern Ry. Co.*, 139 Wis. 448, 121 N.W. 167 (1909); *Theodosis v. Keeshin Motor Exp. Co.*, 341 Ill. App. 8, 92 N.E.2d 794 (1950).

Therefore, under retroactively analysis, the amendment is not "remedial" and can only be applied prospectively from its effective date, June 7, 2006, and does not govern whether the Emily Lane HOA has a right to bring a claim against Colonial Development, LLC after its certificate of formation was cancelled.

E. RCW 25.15.300 ONLY APPLIES TO KNOWN CLAIMS, NOT POTENTIAL UNKNOWN CLAIMS.

RCW 25.15.300 requires that a limited liability company which has dissolved shall pay or make reasonable provisions to pay all claims and obligations, including all contingent, conditions, or unmatured claims and obligations, ***known to the limited liability company***. The statute does not mention "potential" unknown claimants. Otherwise, that would mean that any former person or entity would be a creditor if the statutory phrase "*contingent, conditional, or unmatured claims and obligations, known to the limited liability company*" really means "*contingent, conditional, or unmatured claims and obligations, potentially known to the limited liability company.*" If this were the case, a limited

liability company could never distribute its assets because it may have potential unknown claims against it in the future. There is nothing in RCW 25.15.300 to support the proposition that a dissolving corporation must create a trust fund for "potential" claimants. Here, Colonial Development had no knowledge of the Emily Lane HOA's claims at the time its certificate of formation was cancelled.

III. CONCLUSION

RCW 25.15.303 does not apply retroactively to resurrect the Emily Lane HOA's claims against Colonial Development, LLC. Thus, the court should affirm a dismissal of the Emily Lane HOA's claims against Colonial Development, LLC and the Respondents.

DATED this 19 day of March, 2007.

OLES MORRISON RINKER & BAKER LLP

By _____
Eileen I. McKillop, WSBA 21602
Attorneys for Appellant /Cross-Respondent Colonial Development, LLC and Respondents